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In the

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1422

AZZARELLI CONSTRUCTION CO. and
JOHN F. AZZARELLI,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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STATEMENT

Petitioners Azzarelli Construction Company and John F. Azzarelli pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is not yet reported. The opinion is set forth in Appendix A to this petition.

JURISDICTION

The decision of the United States Court of Appeals for the Seventh Circuit was entered on December 28, 1979. A timely petition for rehearing *en banc* was denied on February 12, 1980. This petition was filed within thirty days of that date. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Seventh Circuit, by approving the trial court's instructions to the jury on the interstate commerce element of the Sherman Act charge, improperly expanded the concept of the flow of interstate commerce to preclude the notion of termination and incorrectly held that a wholly intrastate price-fixing conspiracy presumptively affects interstate commerce.

2. Whether the Court of Appeals for the Seventh Circuit, by approving the use of co-conspirator declarations in this case, improperly left unresolved a question regarding the admissibility of co-conspirator declarations about which several circuit courts of appeals are in conflict.

STATUTE INVOLVED

15 U.S.C. § 1 which provides in pertinent part that:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: . . .

The statute is fully set forth in Appendix B to this petition.

STATEMENT OF THE CASE

This petition seeks review of a decision of the Seventh Circuit Court of Appeals affirming a jury verdict of guilty on an indictment which charged in one count a violation of section one of the Sherman Act, 15 U.S.C. § 1, and in twelve counts violations of the mail fraud statute, 18 U.S.C. § 1341.

1. INTERSTATE COMMERCE

Count one of the indictment, charging a violation of section one of the Sherman Act, alleged that petitioners conspired to suppress and eliminate competition for the construction of at least one specific portion of a public federal-aid highway project let by the State of Illinois on July 29, 1975.[1]

To prove the interstate commerce element of the Sherman Act count, the government relied upon the use of bituminous concrete in the construction of the highway projects at issue. Specifically, the government, by stipulation, proved that crude oil moved in interstate commerce into the State of Illinois; that after its arrival in the State of Illinois the crude oil was processed into a residual oil component; that the residual oil component from the crude oil was processed into asphalt cement, which later was sold to petitioner Azzarelli Construction Company and a co-conspirator and that the asphalt cement was used by petitioner Azzarelli Construction Com-

[1] Counts two through thirteen of the indictment, charging violations of the mail fraud statute, 18 U.S.C. § 1341, essentially were based upon the same fact situation as set forth in Count one, the Sherman Act charge: bid rigging and restraint of competition in interstate commerce.

pany and the co-conspirator in the production of bituminous concrete at their Illinois plants. It was further stipulated that petitioner Azzarelli Construction Company purchased asphalt cement outside the State of Illinois, which was used subsequently in the production of bituminous concrete at its Illinois plant. The bituminous concrete then was used in the construction of highway projects let by the State of Illinois on July 29, 1975.

As additional proof of the interstate commerce element, the government adduced evidence that two of the highway construction projects that were the subject of the indictment were, in part, federally funded.

Petitioners, in their defense, introduced evidence to demonstrate that the flow of interstate commerce had terminated. Thus, petitioners' unrebutted evidence demonstrated that the manufacture of bituminous concrete is a complex processing operation which involves substantial chemical and molecular changes; that significant chemical and molecular changes occur in crude oil during the manufacture of asphalt cement and that there are additional chemical and physical changes in asphalt cement in the production of bituminous concrete. In essence, bituminous concrete is a different product from both crude oil and asphalt cement.

The trial court refused to instruct the jury on the issue of termination of interstate commerce. In addition, the trial court in effect, instructed the jury that in an "affect commerce" case an intrastate price-fixing and bid-rigging conspiracy presumptively effected interstate commerce.[2]

[2] The trial court's instructions on the interstate commerce issue are set forth in Appendix C.

Petitioners objected to the trial court's charge and tendered instructions which correctly set forth the interstate commerce element as put in issue by the evidence. Those instructions were refused.[3]

On the issue of the propriety of the trial court's instructions on the interstate commerce element, the Court of Appeals rendered alternative holdings: (1) that, as a matter of law, petitioners were not entitled to their tendered instruction on termination of the flow of interstate commerce because the concept of the flow of interstate commerce is of such breadth that no amount of change, processing or manufacturing of a product can remove it from interstate commerce at least for purposes of the Sherman Act; (2) that, in any event, the trial court's instructions to the jury on the "affect commerce" theory were adequate because price-fixing and bid-rigging (*per se* restraints) presumptively affect interstate commerce regardless of the proof of the type of nexus with commerce.

2. CO-CONSPIRATOR DECLARATIONS

Over petitioners' objections, the government introduced into evidence at trial the co-conspirator declarations of the witnesses Kretschmar and Boettcher. At the close of the government's case and again at the close of all the evidence, petitioners moved for judgment of acquittal. As one of the points in their motion, petitioners argued that the government had failed to establish, by a preponderance of the *independent evidence*, the existence of the conspiracy alleged in the indictment and each defendant's connection therewith. Accordingly, petitioners contended

[3] Petitioners' tendered instructions are set forth in Appendix D to this petition.

that under *United States* v. *Santiago,* 582 F.2d 1128 (7th Cir. 1978) and other decisions, the trial court, in ruling on the motions for judgment of acquittal, could not consider the co-conspirator declarations of the witnesses Kretschmar and Boettcher. Without making findings the trial court denied the motions for judgment of acquittal indicating several times his belief that no co-conspirator declarations had actually been introduced into evidence. In effect, then, the trial court admitted the co-conspirator declarations, relying, in part, upon the very hearsay statements sought to be admitted.[4]

The Court of Appeals ruled that the trial judge had properly admitted the co-conspirator declarations.

[4] The trial court's statements on the question of the introduction into evidence of co-conspirator declarations are set forth at Appendix E to this petition.

REASONS FOR GRANTING THE WRIT

INTRODUCTION

By upholding the trial court's refusal to instruct the jury on the question of termination of the flow of interstate commerce and by approving the adequacy of the trial court's jury instructions on the "in commerce" and "affect commerce" theories in this case, the Seventh Circuit impermissibly expanded the concept of the flow of interstate commerce under the Sherman Act and improperly applied the *per se* rule to provide that under an "affect commerce" theory, a wholly intrastate conspiracy to fix prices presumptively affects interstate commerce. The Seventh Circuit's decision, without support in the decided case law, conflicts with three decisions of this Court, *McLain* v. *Real Estate Board of New Orleans,* ..... U.S. ....., 62 L.Ed.2d 441 (1980), *Goldfarb* v. *Virginia State Bar Ass'n.,* 421 U.S. 773 (1975) and *Gulf Oil Corp.* v. *Copp Paving Co.,* 419 U.S. 186 (1974), and with three decisions of other circuit courts of appeals, *United States* v. *Flom,* 558 F.2d 1179 (5th Cir. 1977), *United States* v. *Bensinger,* 430 F.2d 584 (8th Cir. 1970), and *Las Vegas Merchant Plumbers Ass'n.* v. *United States,* 210 F.2d 732 (9th Cir.), *cert. denied,* 348 U.S. 817 (1954). The ramifications of the decision are serious. By precluding, as a matter of law, the concept of termination of the flow of interstate commerce and by holding that a wholly intrastate conspiracy to fix prices presumptively affects interstate commerce, the Seventh Circuit's decision ignores existing authority on both the jurisdictional and substantive interstate commerce requirements and threatens to confuse the increasingly numerous trial of cases brought under the Sherman Act—both civil and criminal.

In addition, the Seventh Circuit's decision, by approving the use of co-conspirator declarations in this case, failed to resolve an important issue which was squarely presented by this case: namely, whether this Court's pronouncement in *Glasser* v. *United States,* 315 U.S. 60, 62 (1942), that the existence of a conspiracy could not be proved by the very hearsay statements for which admissibility was being sought, was overruled by the adoption of Fed.R.Evid. 104. Other circuit courts of appeals are in conflict on the question.[5]

I.

THERE IS A CONFLICT BETWEEN THE DECISION BELOW AND DECISIONS OF THIS COURT AND SEVERAL COURTS OF APPEALS REGARDING THE APPLICATION OF THE SHERMAN ANTITRUST ACT.

A

"IN COMMERCE" INSTRUCTIONS

The government sought to prove an "in commerce" theory in this case and, to that end, relied upon the use of bituminous concrete in the construction of interstate highways to satisfy the "in commerce" test. It was petitioners' theory of defense, supported by legal authority and by substantial evidence adduced at trial, that the

[5] Compare United States v. Vinson, 606 F.2d 149, 153 6th Cir. 1979), United States v. James, 590 F.2d 575, 592 (5th Cir. 1979) (Tjoflat, J., concurring) and United States v. Martorano, 557 F.2d 1, 12 (1st Cir. 1977), *cert. denied,* 435 U.S. 922 (1978) (bootstrapping permitted) *with* United States v. James, 590 F.2d 575, 581 (5th Cir. 1979) (Clark, J. for *en banc* court), and United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978) (bootstrapping not permitted).

only goods shown to have moved in interstate commerce —crude oil and asphaltic cement—terminated or came to rest. Petitioners' tendered instruction set forth that theory.

The court below held that petitioners were not entitled, as a matter of law, to an instruction on termination because the breadth of the Sherman Act precludes the notion of termination. In so holding, the Seventh Circuit impermissibly expanded the "in commerce" theory by adopting a "nexus to commerce" approach and by discarding the concept of termination. The ruling thus put the Seventh Circuit in conflict with *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974) and *United States* v. *Flom,* 558 F.2d 1179 (5th Cir. 1977).

In *Gulf Oil,* this Court rejected the type of "nexus to commerce" approach, adopted by the court below, stating:

> Copp's "in commerce" argument rests essentially on a purely formal 'nexus' to commerce: the highways are instrumentalities of interstate commerce; therefore any conduct of petitioners with respect to an ingredient of a highway is per se "in commerce." Copp thus would have us expand the concept of the flow of commerce by incorporating categories of activities that are perceptively connected to its instrumentalities. . . . The claim of connection has no logical end point. The universe of arguably included activities would be broad and its limits nebulous in the extreme. . . . More importantly, to the extent that those limits could be defined at all, the definition would in no way be anchored in the economic realities of interstate markets, the intensely practical concerns that underlie the purposes of the antitrust laws.

419 U.S. at 198.

The court below said, in essence, that if materials (crude oil and asphaltic cement) crossed a state line and then became ingredients of a product (bituminous concrete) which was affected by an illegal conspiracy, then that conspiracy was affecting goods moving in the flow of interstate commerce. Or, put in the words of *Gulf Oil,* the court said that any conduct of the defendants with respect to an ingredient of an interstate highway was per se in commerce. But, as *Gulf Oil* noted, under that view, "the chain of connection has no logical endpoint" and "[t]he universe of arguably included activities would be broad and its limits nebulous in the extreme." 419 U.S. at 198. Accordingly, under *Gulf Oil,* the court's expansive treatment of the "in commerce" theory is incorrect.[6]

The "in commerce" theory also has been improperly expanded because the court below has discarded the concept of termination of interstate commerce by ruling that, as a matter of law, there is no form of change, processing or manufacturing that would take a product out of the flow of interstate commerce for purposes of section one of the Sherman Act. This ruling directly conflicts with *United States* v. *Flom,* 558 F.2d 1179 (5th Cir. 1977). *Flom* held that substantial processing, substantial change in the character of a commodity or appreciable warehousing may break the flow of interstate commerce and

[6] Although the issue of *Gulf Oil*—whether companies engaged in paving interstate roads were "in commerce"—arose in the context of the Robinson-Patman Act, 15 U.S.C. § 13(a), and the Clayton Act, 15 U.S.C. §§ 14 and 18, any question concerning its applicability in the context of the Sherman Act was laid to rest by this Court's recent decision in McLain v. Real Estate Board of New Orleans, ... U.S. ....., 62 L.Ed. 2d 441, 450 (1980).

that the question is one to be resolved by a properly instructed jury. 558 F.2d at 1184.

Because this Court has rejected the "nexus to commerce" approach and because *Flom* held that substantial processing or change in a product may break the flow of commerce, the Seventh Circuit's ruling in this case deeming the "in commerce" instructions adequate was erroneous.

B

"AFFECT COMMERCE" INSTRUCTIONS

Petitioners argued to the court below that the trial court's charge to the jury on the "affect commerce" theory was erroneous because it applied the *per se* rule to establish a presumptive effect on interstate commerce. Petitioners urged that the instructions to the jury were incorrect because they permitted the jury to apply the *per se* rule without first requiring a factual finding that the wholly intrastate conspiratorial activities in question substantially affected interstate commerce and without advising the jury how to determine whether a substantial effect on interstate commerce had occurred.[7] The court

[7] Under the instructions given, the jury was told that an essential element of the charged Sherman Act offense was that the defendants' alleged unreasonable restraint must involve interstate commerce. The term "interstate commerce" was defined as including transactions of commodities moving in the flow of interstate commerce, as well as entirely intrastate transactions which substantially affect interstate commerce. The jury was told that it was for them to determine whether the defendants' conduct involved such interstate commerce. However, the jury then was told that certain types of conduct, including price-fixing, bid-rigging and division of markets, were

below deemed the instructions adequate, thereby putting the Seventh Circuit in conflict with *McLain* v. *Real Estate Board of New Orleans, Inc.*, ... U.S. ....., 62 L.Ed. 2d 441 (1980), *Goldfarb* v. *Virginia State Bar Ass'n.*, 421 U.S. 773 (1975), *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974), *United States* v. *Bensinger*, 430 F.2d 584 (8th Cir. 1970), and *Las Vegas Merchant Plumbers Ass'n.* v. *United States*, 210 F.2d 732 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954).

In rejecting petitioners' contention regarding the erroneous instructions on the "affect commerce" theory, the court below relied upon *Goldfarb* for the proposition that in an "affect commerce" case, the *per se* rule can be applied to presume an effect on interstate commerce[8]. The *per se* rule, however, is totally unrelated to the concept of interstate commerce, whether in an "in commerce" or an "affect commerce" case. The *per se* rule is simply a substantive rule of antitrust law which re-

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[7] (Continued)

unreasonable *per se* and that this meant that "the mere doing of the act itself constitutes an unreasonable restraint on interstate commerce." (Appendix C). The effect of the quoted instruction was to withdraw from the jury the factual question of whether the petitioners' alleged conspiratorial conduct, if found to be wholly intrastate, substantially affected interstate commerce. Instead of leaving this question of fact for the jury's determination, the quoted instruction directed a finding that the alleged conspiratorial activity substantially affected intrastate commerce.

[8] McLain v. Real Estate Board of New Orleans, Inc., ... U.S. ....., 62 L.Ed. 2d 441, 452 (1980), made clear, as petitioners had argued below, that *Goldfarb* was an "in commerce" and not an "affect commerce" case.

lieves the government of the burden of demonstrating the unreasonableness of certain types of activities such as price-fixing or bid-rigging.

Goldfarb, McLain and *Gulf Oil* are directly at odds with the court below in that those cases reject the proposition that a wholly intrastate or local conspiracy to fix prices or rig bids (*per se* activity) presumptively effects interstate commerce. As this Court stated in *Gulf Oil*:

> The plaintiff must allege and prove that apparently local acts in fact have adverse consequences on interstate markets and the interstate flow of goods in order to invoke federal antitrust prohibitions. . . .

419 U.S. at 202.

Because *McLain, Goldfarb* and *Gulf Oil* specifically require proof of an effect on interstate commerce in an "affect commerce" case and specifically reject the proposition that an effect on interstate commerce can be presumed, the court below was incorrect in deeming the instructions on the "affect commerce" theory—which permitted the jury to presume an effect on interstate commerce—to be adequate.

The Seventh Circuit's ruling that the trial court's instructions on the "affect commerce" theory were adequate is also squarely at odds with *United States* v. *Bensinger*, 430 F.2d 584 (8th Cir. 1970), and *Las Vegas Merchant Plumbers Ass'n* v. *United States*, 210 F.2d 732 (9th Cir.), *cert. denied*, 348 U.S. 817 (1954). Both *Bensinger* and *Las Vegas Merchant Plumbers* involved the question, as argued by the government, of whether a wholly intrastate price-fixing conspiracy presumptively affects interstate commerce. Both cases specifically held that in an "affect commerce" situation, a jury must be

instructed that it is a question of fact for it to determine whether the wholly intrastate conspiratorial activity complained of substantially affected interstate commerce[9]. The jury was not so instructed in this case. To the contrary, that factual question was withdrawn from the jury's consideration when it was instructed that, under the *per se* rule it could presume that an intrastate conspiracy to fix prices affects interstate commerce.

Given the conflict resulting from the Seventh Circuit's decision in this case, we respectfully suggest that this Court should grant the writ.

II.

THE DECISION BELOW LEFT UNRESOLVED A QUESTION OF IMPORTANCE REGARDING THE ADMISSIBILITY OF CO-CONSPIRATOR DECLARATIONS ABOUT WHICH OTHER CIRCUIT COURTS OF APPEALS ARE IN CONFLICT.

Petitioners argued below that the trial court had erred in failing to state, on the record, any findings regarding the existence of the alleged conspiracy, petitioners' connection therewith and the admissibility of the co-conspirator declarations. In addition, petitioners argued that the trial court erroneously considered the hearsay statements, which the government sought admitted, in determining the question of the conspiracy's existence and petitioners' connection therewith. The court below held that the trial judge sufficiently indicated that the alleged conspiracy existed and that petitioners were connected therewith. By so ruling, the Court failed to resolve an important

[9] The trial court's charge on the interstate commerce issue in *Bensinger,* which is set forth in its entirety in the opinion, is identical in all material respects to the charge in the instant case. 430 F.2d at 590.

issue: namely, whether the pronouncement of *Glasser* v. *United States,* 315 U.S. 60, 62 (1942), that the existence of a conspiracy could not be proved by the very hearsay statements for which admissibility was being sought, was overruled by the adoption of Fed.R.Evid. 104. Other circuit courts of appeals presently are in conflict on the question[10]. Additionally, the Court's ruling does not comport with decisions from other circuits which require a trial judge, in determining the existence of a conspiracy and each defendant's connection therewith, to (1) exercise his fact finding responsibility by evaluating both credibility and weight of the evidence[11], and (2) make explicit findings on the record[12].

The record discloses that the trial judge believed that no co-conspirator declarations had been introduced into evidence. Being of that belief, the trial court necessarily relied upon the contents of the co-conspirator declarations, that in fact were introduced into evidence, to determine the existence of a conspiracy. This case thus directly

[10] Compare United States v. Vinson, 606 F.2d 149, 153 (6th Cir. 1979), United States v. James, 590 F.2d 575, 592 (5th Cir. 1979) (Tjoflat, J. concurring), and United States v. Martorano, 557 F.2d 1, 12 (1st Cir. 1977), *cert. denied,* 435 U.S. 922 (1978) (all permitting trial court to consider the very statement sought to be admitted) *with* United States v. James, 590 F.2d 575, 581 (5th Cir. 1979) (Clark, J. for en banc court), and United States v. Bell, 573 F.2d 1040, 1044 (8th Cir. 1978) (bootstrapping not permitted).

[11] E.g., United States v. Enright, 579 F.2d 980, 985 (6th Cir. 1978).

[12] E.g., United States v. Macklin, 575 F.2d 1046, 1048-49 (8th Cir. 1978), *cert. denied,* 439 U.S. 852 (1979); United States v. Bell. 573 F.2d 1040, 1044 (8th Cir. 1978).

presents the question of whether Fed.R.Evid. .104 overrules *Glasser's* pronouncement.

By leaving the "bootstrapping" question unresolved, and by failing to decide the adequacy of the trial court's findings, the federal courts have been left without the necessary guidance to make correct evidentiary rulings which are properly reviewable.

Therefore, we respectfully request that this Court should grant the writ on the grounds of the importance of the question and the existence of inter-circuit conflict.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 79-1348 and 79-1349

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

AZZARELLI CONSTRUCTION CO. and JOHN F. AZZARELLI,
Defendants-Appellants.

Appeal from the United States District Court for the Eastern District of Illinois, East St. Louis Division.
No. 78-Cr.-20—JAMES L. FOREMAN, *Judge.*

ARGUED NOVEMBER 8, 1979—DECIDED DECEMBER 28, 1979

Before PELL and BAUER, *Circuit Judges,* and DUMBAULD, *Senior District Judge.*•

DUMBAULD, *Senior District Judge.* Appellants Azzarelli Construction Company, and John F. Azzarelli, its vice-president were convicted of bid-rigging on three highway projects in Illinois in violation of Section 1 of the Sherman

• The Honorable Edward Dumbauld, Senior District Judge of the United States District Court for the Western District of Pennsylvania, sitting by designation.

Act, 15 U.S.C. 1, and of twelve counts of mail fraud in violation of 18 U.S.C. 1341. The corporation was fined $200,000 on the antitrust count and a total of $12,000 on the mail fraud counts. Azzarelli was fined $25,000 and sentenced to a suspended two-year prison term with three years' probation after serving the first ninety days.

Other defendants indicted are not involved in this appeal. Azzarelli's brother Joseph, president of the company, was acquitted by the jury. Central States Engineering, Inc. was acquitted of mail fraud charges but convicted of the antitrust violation, and has not appealed. Loitz Brothers Construction Company, and its affiliate Kankakee Paving Corporation pleaded guilty to the Sherman Act count and to one count of mail fraud.

The dealings which led to the collusive bids were conducted by Lawrence Loitz for Loitz Brothers and Kankakee Paving, by Larry Boetcher for Central States, and by John Azzarelli for Azzarelli Construction Company. The three men carried on their discussions at a hotel in Springfield the day before the bidding was to take place.

I—THE SHERMAN ACT

The Sherman Antitrust Act of July 2, 1890, 26 Stat. 209, 15 U.S.C 1, has been likened to a charter of economic liberty, expressing a national policy akin to constitutional principles in importance and impact upon the general welfare.

As well stated by the late Mr. Justice Hugo Black:

> The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest

quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits "Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States." Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which "unreasonably" restrain competition. *Standard Oil Co. of New Jersey* v. *United States,* 221 U.S. 1; *Chicago Board of Trade* v. *United States,* 246 U.S. 231.

However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, *United States* v. *Socony-Vacuum Oil Co.,* 310 U.S. 150, 210; division of markets, *United States* v. *Addyston Pipe & Steel Co.,* 85 F. 271, aff'd. 175. U.S. 211; group boycotts, *Fashion Originators Guild*

v. *Federal Trade Com'n,* 312 U.S. 457; and tying arrangements, *International Salt Co.* v. *United States,* 332 U.S. 392.[1]

The case at bar is a typical or classical example of division of markets or allocation of business by bid-rigging which has been recognized as a *per se* violation since the Taft opinion in *Addyston Pipe.* Able defense counsel ingeniously seeks to modify the traditional contours of *per se* violations by inserting an additional element in the definition of such an offense.

The contention is thus formulated in appellants' brief (p. 56): "To invoke the *per se* rule . . . the Government is required to prove not only a price-fixing, bid-rigging or job allocation agreement, but it must also prove, as an element of the offense, that the conspiratorial activities involved transactions *in the flow* of interstate commerce.[2]"

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[1] *Northern Pac. R. Co.* v. *U.S.,* 356 U.S. 1, 4-5 (1958). This statement echoes an earlier pronouncement by Mr. Chief Justice Charles Evans Hughes in *Appalachian Coals Inc.* v. *U.S.,* 288 U.S. 344, 359-60 (1933): "The purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor. As a charter of freedom, the Act has generality and adaptability comparable to that found to be desirable in constitutional provisions." On the fluctuating judicial construction regarding the "rule of reason" interpolation see Robert H. Jackson and Edward Dumbauld "Monopolies and the Courts," 86 U. of Pa. L.R. (January, 1938), 231, 242-49; and *Continental T. V. Inc.* v. *GTE Sylvania Inc.,* 433 U.S. 36, 49-59 (1977).

[2] Italics supplied. On the following page appellants recognize that conspiracies violating § 1 of the Sherman Act may either "affect commerce" or occur "in commerce." The second class are described as "in the flow"

In other words, appellants argue that a *per se* violation can occur only in a "flow" of commerce situation, and not in an "affecting" commerce situation. This argument, unsupported by authority, is untenable. It confuses the type of *restraint* ("*per se*" or "unreasonable") with the type of nexus with *commerce* ("in" or "affecting").

With respect to the restraints forbidden by § 1 of the Sherman Act[3] the cases have recognized that in enacting § 1 Congress "wanted to go to the utmost extent of its Constitutional power" and hence that "however local its immediate object, a 'contract, combination . . . or conspiracy' nonetheless may constitute a restraint within the meaning of § 1 if it substantially and adversely affects interstate commerce."[4]

Goldfarb v. *Va. State Bar,* 421 U.S. 773, 780, 784-85 (1975), obviously is inconsistent with appellants' contention. That was a *per se* price-fixing case (with respect to fees charged by lawyers for title searches, a local activi-

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[2] (Continued)

of commerce. On "flow" see *Chicago Bd. of Trade* v. *Olsen,* 262 U.S. 1, 35 (1923); *Stafford* v. *Wallace,* 258 U.S. 495, 515-21 (1922); and *Swift & Co.* v. *U.S.,* 196 U.S. 375, 398-400 (1906). The jury was instructed on both theories. See Government's Instruction No. 18 and Defendant's Instruction No. 53 which were given by the Court without modification.

[3] Unlike the Robinson-Patman Act, see *Gulf Oil Corp.* v. *Copp Paving Co.,* 419 U.S. 186, 194-95 (1974).

[4] The quoted language is from the case cited in note 3, *supra.* The Court there goes on to quote the colorful aphorism of Justice Robert H. Jackson, "If it is interstate commerce that feels the pinch it does not matter how local the operation which applies the squeeze." *U.S.* v. *Women's Sportswear Mfrs. Assn.,* 336 U.S. 460, 464 (1949).

ty) and was likewise a case "affecting" interstate commerce.[5]

We now turn to appellants' most plausible contention, that the evidence in the case shows that the interstate commerce affected had terminated, by reason of processing which transformed the nature of the material moving in interstate commerce. Appellants produced an expert witness to prove chemical and molecular change, or the creation of a new product, when crude oil and asphaltic cement were combined to make the bituminous concrete used in the highway construction affected by appellants' rigged bids.

It is doubtful whether, even under the "flow" theory such a change would suffice to render § 1 of the Sherman Act inapplicable. In *Swift & Co.* v. *U.S.*, 196 U.S. 375, 399 (1905), Mr. Justice Holmes considered fresh meat (as well as cattle) subject to injunction under the antitrust law. And clearly, under the "affecting commerce" theory [which in the case at bar was adequately presented to the jury, unlike *Las Vegas Merchant Plumbers Assn.* v. *U.S.*, 210 F. 2d 732, 746-47 (C.A. 9, 1954)], the restraint could be one which operated either before, during, or after the interstate movement.[6] In similar vein, the eloquent dissent of Mr. Justice Holmes in *Hammer* v. *Dagenhart*, 247 U.S. 251 (1918), refuted the majority view in that case that commerce in goods produced by child labor was unlike situations where "the use of interstate transportation was necessary to the accomplishment of harmful results."[7] Holmes retorted:

[5] The Court held that the necessity of a title examination to assure a valid lien for interstate lenders demonstrated "that interstate commerce has been sufficiently *affected*." 421 U.S. at 785 (italics supplied).

[6] 210 F.2d at 740; *Evans* v. *S.S. Kresge Co.*, 394 F. Supp. 817, 830. 837 (W.D. Pa. 1975).

[7] 247 U.S. at 271. The case was overruled, and the Holmes reasoning adopted, in *U.S.* v. *Darby*, 312 U.S. 100, 114-17 (1941). See Dumbauld, *The Constitution of the United States* (1964) 131-32.

"It does not matter whether the supposed evil precedes or follows the transportation. It is enough that in the opinion of Congress the transportation encourages the evil."[8]

Appellants' contention falls within the category of "mechanical distinctions" condemned in *Mandeville Island Farms* v. *American Crystal Sugar Co.*, 334 U.S. 219, 229 (1948). Such artificial separation of production and manufacturing from commerce "without regard to their economic unity" would be a "reversion to conceptions formerly held[9] but no longer effective to restrict either Congress' power . . . or the scope of the Sherman Acts' coverage." Such a reversion to outmoded concepts, rejected in *Mandeville* almost forty years ago, is *a fortiori* unavailing now. In *Mandeville* the distinction was between sugar beets and manufactured sugar. The Court was not impressed by this transformation, and applied the doctrine of *Wickard* v. *Filburn* which had dealt with an "identical commodity [wheat] from the planting stage through the phase of interstate distribution." 334 U.S. at 237. The Court concludes that "mere change in the form of the commodity or even complete change in essential quality by intermediate refining, processing or manufacturing does not defeat application of the statute. . . .[10] Again, as we have said, the vital

[8] 247 U.S. at 279-80.

[9] As in the discredited case of *U.S.* v. *E. C. Knight Co.*, 156 U.S. 1, 17 (1895), now superseded by cases such as *Wickard* v. *Filburn*, 317 U.S. 111, 122-25 (1942).

[10] See also *Doctors, Inc.* v. *Blue Cross*, 490 F. 2d 48, 52-53 (C.A. 3, 1973). Of course there are situations, unlike the application of the Sherman Act, where transformation into a new product would be material. Examples are the application of rates and tariffs on specified commodities by the Interstate Commerce Commission or the Court of Customs and Patent Appeals; or questions of an owner's right to reclaim his property when commingled with that of another, as when a famous artist paints a portrait on canvas belonging to someone else. See Dumbauld, *Thomas Jefferson and the Law* (1978) 110.

thing is the effect on commerce, not the precise point at which the restraint occurs or begins to take effect. . . . Hence . . . the mere fact that the price fixing related directly to the beets did not sever or render insubstantial its effect subsequently on the sale of sugar." 334 U.S. at 238. Similarly it seems clear that in the case at bar the fact that the price fixing impinged on the new product (asphalt concrete) rather than the ingredients thereof did not diminish its impact or render insubstantial its effect on the sale of crude oil and asphaltic cement in interstate commerce.

One type of substantial effect upon interstate commerce in the materials used for road construction in Illinois flows from the diminished funding available for highway construction, by reason of the impact of appellants' conspiracy to submit bids at non-competitive prices. This type of harmful effect upon interstate commerce suffices in antitrust cases, as well as in cases involving other types of obstruction to interstate commerce.[11] *Hospital Building Co.* v. *Rex Hospital Trustees,* 425 U.S. 738, 744-45 (1976); *Burke* v. *Ford,* 389 U.S. 320, 321-22 (1967);[12] *U.S.* v. *Finis P. Ernest, Inc.,* 509 F. 2d 1256, 1261 (C.A. 7, 1975); *Doctors, Inc.* v. *Blue Cross,* 490 F. 2d 48, 51-53 (C.A. 3, 1973). It is undeniable that appellants' conspiracy by increasing the cost of highway projects using asphalt concrete made from crude oil and asphaltic cement moving in interstate commerce substantially and adversely affected such commerce in those

[11] For recognition of this type of harmful effect upon interstate commerce in cases not arising under the Sherman Act, see *Heart of Atlanta Motel* v. *U.S.,* 379 U.S. 241, 257 273-74 (1964); *U.S.* v. *Mazzei,* 521 F. 2d 639 (C.A. 3, 1975); *U.S.* v. *Long,* 534 F. 2d 1079, 1099 (C.A. 3, 1976); *U.S.* v. *DeMet,* 486 F. 2d 816, 821-22 (C.A. 7, 1973); *U.S.* v. *Braasch,* 505 F. 2d 139, 147 (C.A. 7, 1974).

[12] This case also disposes of appellants' argument based on termination of interstate commerce when commodities "come to rest" in a warehouse before use within the destination State. 389 U.S. at 321.

commodities. These highway construction projects obviously had more than a *de minimus* effect on interstate commerce. The total of the lowest bids on the three items involved was $3,192,085.54 (In the *Ernest* case the amount of plaintiff's interstate purchases of supplies was only $9,307. 509 F. 2d at 1261).

II—ADMISSIBILITY AND SUFFICIENCY OF EVIDENCE

Appellants' further contend that declarations of coconspirators were improperly received. It is asserted that a pre-trial determination, akin to a motion to suppress, should have been made; and that findings should have been made showing why the evidence was admitted. These steps are not required by the Federal Rules of Evidence or by this Court's decision in *U.S.* v. *Santiago,* 582 F. 2d 1128, 1131-36 (C.A. 7, 1978).

The normal practice, it would seem, would be for a defendant to object at the time the challenged statement is offered. Thereupon, either during a recess granted the jurors or at side bar outside their hearing, counsel would present their respective views of the nature and effect of the state of the record with respect to the existence of sufficient evidence *aliunde* to justify admission of the testimony, and the court would rule. Ordinarily a ruling in favor of admissibility would constitute a determination by the trial judge that the standard set forth in *Santiago* had been met.[13] In the case at bar the trial

[13] This is the practice in the Second Circuit, which follows the *Santiago* standard. *U.S.* v. *Geaney,* 417 F. 2d 1116, 1120 (C.A. 2, 1969). *U.S.* v. *Ziegler,* 583 F. 2d 77, 79-81 (C.A. 2, 1978), was unusual in that the trial judge, although aware of the *Geaney* rule, disregarded it because he disagreed with it. He admitted all declarations offered, leaving entirely to the jury the evaluation of their admissibility, and never at any time making a preliminary determination based on non-hearsay evidence. Hence in *Ziegler* it was impossible to find an implied determina-

judge sufficiently indicated his determination that the *Santiago* requirements had been complied with.

Appellants' argument that there is insufficient evidence to establish a violation of § 1 of the Sherman Act is utterly unmeritorious. The record clearly established collusive allocation of three highway construction contracts.

At the bidding on July 29, 1975, item 25 went to Loitz, who was the only bidder. Azzarelli had agreed to let Loitz have it in reciprocity for a prior contract awarded to Azzarelli several months before. Loitz agreed that Azzarelli (who turned out to be the only bidder) was to get item 26. Loitz also got item 27, on which both Azzarelli and Boettcher submitted high bids, "out of the ball park." Boettcher increased his bid by $1,000,000, and received "payola" of $7500 from Loitz in return for letting the item go to Loitz.[14] The charge of bid-rigging was abundantly proved.

Moreover, there was no possible purpose for appellants' collusion other than to control the allocation of the contracts to the respective collusive bidders. Appellants do not pretend that their price-fixing scheme was engaged in for the ostensible purpose of establishing

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[13] (Continued)
tion by the trial judge that the standard of admissibility had been met, since he had expressly refused to make the determination required by *Geaney*. See 583 F.2d 80 at n. 5.

[14] The jury could well have found that Azzarelli's high bid on item 27 was pursuant to collusion (in spite of his denial) since Loitz would hardly have agreed to pay Boettcher to submit a high bid if there were any danger that Azzarelli would submit a low bid on that item. It is of no consequence that Azzarelli may not have known that Boettcher was to receive "payola." All three of the bidders engaged in extensive "wheeling and dealing" in various conversations the day before the bidding.

a "meeting competition defense" under the Robinson-Patman Act, as was contended by defendants in *U.S.* v. *U.S. Gypsum Co.*, 438 U.S. 422, 454-58 (1978). Appellants' reliance on that case is utterly unpersuasive. Indeed, the conduct of appellants abundantly satisfies the *Gypsum* standard that although criminal offenses under the Sherman Act should be "construed as including intent as an element" [438 U.S. at 443], nevertheless "action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws." 438 U.S. at 444. Clearly the appellants were "consciously behaving in a way the law prohibits." 438 U.S. at 445. Their attention was specifically called to the illegality of collusive bidding when they executed affidavits denying the existence of such behavior. It is impossible to infer lack of the requisite intent or *mens rea* in their conduct.

III—MAIL FRAUD COUNTS

The counts in the indictment dealing with mail fraud also resulted in valid convictions. To prove this charge[15] the Government must establish (1) a scheme to defraud, and (2) use of the mails for the purpose of executing the scheme. *Pereira* v. *U.S.*, 347 U.S. 1, 9 (1954).[16]

Appellants argue that an antitrust conviction constitutes an exclusive remedy for anticompetitive conduct and precludes prosecution under the mail fraud statute. While under many circumstances a violation of the anti-

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[15] Violation of 18 U.S.C. 1341.

[16] It is not necessary that a defendant mail anything himself; it is sufficient if he caused it to be done. "Where one does an act with knowledge that the use of the mails will follow in the ordinary course of business, or where such use can reasonably be foreseen, even though not actually intended, then he 'causes' the mails to be used." 347 U.S. at 8-9.

trust laws might occur without involving any fraudulent conduct, there may also be circumstances where fraud is an ingredient of the anticompetitive scheme.

The circumstances of the case at bar, involving collusion to defeat a statutory scheme of competitive bidding prescribed in the public interest by the federal Government and the State of Illinois in order to obtain for taxpayers the lowest possible costs for public works being undertaken, plainly manifest a species of fraud or false representation. This is particularly true where, as here, the bidders were required by law to sign (and did sign) statements that no collusion had been practiced. Under these circumstances appellants' conduct was not only anticompetitive but also fraudulent. Since the two crimes required proof of different facts, conviction of one did not preclude simultaneous conviction for the other. *Gavieres* v. *U.S.*, 220 U.S. 338, 342-43 (1911); *Carter* v. *McClaughry,* 183 U.S. 365, 394-95 (1902).

Accordingly, the judgment of the District Court is affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

As amended Dec. 21, 1974, Pub.L. 93-528, § 3, 88 Stat. 1708; Dec. 12, 1975, Pub.L. 94-145, § 2, 89 Stat. 801.

APPENDIX C

Now, Section One of the Sherman Act provides in pertinent part as it is applicable here in this case as follows:

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.

Each defendant has been indicted in Count One for the crime of conspiracy in restraint of trade in violation of Section 1 of the Sherman Act. To prove (a) [sic] defendant guilty of this crime the Government must prove beyond a reasonable doubt that he was a member of conspiracy whose purpose was to effect an unreasonable restraint of interstate or foreign commerce.

• • •

An essential element of the offenses prohibited by the Sherman Act is that the defendant's alleged unreasonable restraint and the unreasonable restraint must involve interstate commerce. The term 'interstate commerce' includes transactions of commodities moving across state lines, or in the flow of interstate commerce after their journey has commenced and until it is terminated, as well as entirely intra-state transactions which substantially affect interstate commerce.

It is a question of fact for the jury to determine whether defendant's conduct involves such interstate commerce in the light of business practices. In cases involving products moving across state lines, or in the flow of commerce, it is not material how much commerce is involved so long as a not insubstantial amount is involved.

It is not necessary for the Government to establish that every defendant operated in interstate commerce,

for a combination of conspiracy which restrains interstate commerce is illegal even if none of the members conducts interstate operations.

Certain types of conduct are regarded as unreasonable per se. This means that the mere doing of the act itself constitutes an unreasonable restraint on interstate commerce, and it is not necessary to consider why the acts were committed, or their effect on the industry, or any other explanatory matter. Conduct regarded as unreasonable per se includes price fixing, division of markets and bid rigging.

But conduct—and where conduct is unreasonable per se and where that is shown, it cannot be justified or excused by the elimination of competitive evils or the good motives of the conspirators, or the fact that prices were not unreasonably high or arbitrary.

• • •

To constitute a violation of the Sherman Act it is not sufficient that the acts complained of affect a business engaged in interstate commerce; the acts complained of must affect the interstate commerce of that business. The effect of a local restraint on interstate commerce must be direct and substantial and not merely inconsequential, remote or fortuitous.

APPENDIX D

Defendants' tendered Instruction No. 47:

Section 1 of the Sherman Act applies to transactions in the flow of interstate commerce, and also intrastate transactions which substantially affect interstate commerce. A prosecution brought under the Sherman Act, so far as the interstate commerce requirement is concerned, may rest on one or both of two theories:

(1) That the acts complained of, occurred within the flow of interstate commerce.

(2) That the acts complained of, occurred wholly on the state or local level, in intrastate commerce, but substantially affected interstate commerce.

Under either of these theories, the transactions complained of must affect or have an effect of interstate commerce or the requirements of the Sherman Act are not satisfied. If there is price-fixing of materials moving within the flow of interstate commerce it is conclusively presumed that there has been a substantial effect on interstate commerce regardless of the amounts involved. This is referred to as the per se rule.

Where the transactions complained of take place wholly within a state, or after goods which were in the flow of commerce have left the flow of commerce and come to rest, the government must prove beyond a reasonable doubt that such intrastate transactions and activities had a substantial impact or effect on interstate commerce, or that they substantially affected the flow of interstate commerce,

Defendant's tendered Instruction No. 48:

The indictment charges:

"The activities of the defendants were within the flow of interstate commerce and had a substantial effect on interstate commerce."

Under this charge the government must prove that bituminous concrete used in the construction of items numbered 25, 26 and 27 of the State of Illinois highway letting of July 29, 1975, moved in the flow of interstate commerce as I have described it, or that the sale of such bituminous concrete to the State of Illinois had a substantial effect on interstate commerce.

Defendants' tendered Instruction No. 51:

Goods or materials have left the flow of interstate commerce and come to rest if they undergo a substantial processing operation, if they undergo an appreciable change in their character or if they are warehoused for an appreciable length of time before shipment.

Defendants' tendered Instruction No. 52:

In order to prove that there was an unreasonable restraint on interstate commerce, outside the flow of goods in interstate commerce, the government must prove that the defendants joined in an illegal conspiracy as I have defined it, and that as a result of that conspiracy, the State of Illinois and the federal government were required to pay greater sums of money for the performance of all three of the items numbered 25, 26 and 27 on the July 29, 1975 State of Illinois highway letting than would have been paid in the absence of such conspiracy, and that the payment of such greater sum of money had a direct and substantial effect on interstate commerce.

APPENDIX E

The Court:

* * *

By either standards, Mr. Stephenson [defense counsel], I think the government has made out a prima facie case against the Defendants on the conspiracy charge and against those named in Counts 2 through 13 on the mail fraud charges.

I agree with, I think, the Government's analysis of the Santiago matter. I don't think it's changed the standard at the close of the Government's case. I think it has changed the—I don't know whether it's changed it, but it's set a new standard for the Court's preliminary determination prior to the acceptance of co-conspirator's statements. We touched on that several times during the trial. *We never really reached it.*

I don't ever recall seeing—because of the possibility of introducing co-conspirator's testimony, of having preliminarily to make the determination whether, by a preponderance of the evidence, a co-conspiracy has been introduced. We got close to it with the Loitz testimony and what John had said or Larry had said to the witness Kretschmar. *But we really never got to that.*

Is that not right?

Mr. Braun [government counsel]: That's my understanding, Judge.

The Court: That's the way I remember it. *I think if we had gotten into that area, then I probably would have had to somewhere make that determination.* By either standard, I feel that the—whether I accepted yours or the Government's, although I'm really not accepting your theory of it, but by either

standard, I think they're [sic] showing has been made.

(Tr. 1179-81) (emphasis added).

Then, at the close of all the evidence, the court made a one sentence statement:

> The Court: The Court, upon consideration of it, hereby denies the motion for judgment of acquittal at the conclusion of all of the evidence.

(Tr. 1816).

Supreme Court, U.S.
FILED
MAY 21 1980
MICHAEL RODAK, JR., CLERK

No. 79-1422

In the Supreme Court of the United States

OCTOBER TERM, 1979

AZZARELLI CONSTRUCTION CO. and
JOHN F. AZZARELLI, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 612 F.2d 292.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1979. A petition for rehearing was denied on February 12, 1980. The petition for a writ

of certiorari was filed on March 13, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district court correctly instructed the jury concerning the interstate commerce element of the offense.

2. Whether out-of-court statements by petitioners' co-conspirators were properly admitted into evidence.

STATEMENT

On June 6, 1978, a federal grand jury sitting in the United States District Court for the Eastern District of Illinois charged four corporations and two individuals with one count of violating Section 1 of the Sherman Act, 15 U.S.C. 1, by conspiring to rig bids on three highway-construction projects let by the State of Illinois and with twelve counts of mail fraud in violation of 18 U.S.C. 1341.[1] At the close of trial, the jury convicted petitioners on all counts. John Azzarelli, part owner and vice president of the Azzarelli Construction Company, was fined $25,000 and sentenced to a suspended two-year prison term

[1] Indicted with petitioners were three other corporations—Loitz Brothers' Construction Company, Kankakee Paving Corp. and Central States Engineering, Inc.—and one other individual, Joseph Azzarelli. Loitz and Kankakee subsequently entered pleas of guilty. Central States was acquitted by the jury of the mail-fraud charges but was convicted of the Sherman Act violation. Joseph Azzarelli was acquitted by the jury of all charges (Pet. App. 2a).

and three years' probation after serving the first ninety days. The company was fined $200,000 on the Sherman Act count and a total of $12,000 on the mail-fraud counts (Pet. App. 1a-2a).

1. Petitioners do not challenge the sufficiency of the evidence presented against them at trial. Briefly, the evidence established that petitioners met with the other defendants and allocated three highway-construction projects among themselves. Pursuant to the agreement, petitioners were the only bidders on one of the projects and were awarded that job. In return, they did not submit a bid on the second project and submitted a complementary bid on the remaining project[2] (Pet. App. 10a). Thus, as the court of appeals noted (*id.* at 4a), this case is a "classical example" of bid rigging.

Petitioners' primary defense at trial was that the conspiracy was not in the flow of and did not affect interstate commerce. The parties stipulated that certain witnesses, if called, would testify that $120,000 worth of bitumen made from crude oil purchased from an out-of-state source and $3,880 worth of bitumen purchased from an out-of-state source were "sold and delivered for use on and was used in the" project allocated to petitioners (Tr. 484). Petitioners' evidence established that the bitumen was mixed with sand and gravel to make bituminous concrete before being used in the project. The district court per-

[2] The term "complementary bid" means one that is intentionally higher than the designated low bid.

mitted petitioners to argue to the jury that the conspiracy had no impact on interstate commerce because the flow of interstate commerce had terminated when the bitumen had been mixed with sand and gravel (Tr. 1967). The court then instructed the jury that it had to determine whether petitioners' activities were in the flow of commerce and, if so, whether the flow had terminated, or whether petitioners' activities substantially affected interstate commerce (Pet. App. 14a-15a). The jury convicted petitioners.

2. The court of appeals affirmed petitioners' convictions. The court initially rejected petitioners' argument "that a *per se* violation [of the Sherman Act] can occur only in a 'flow' of commerce situation, and not in an 'affecting' commerce situation" (Pet. App. 5a). Turning to petitioners' argument that the flow of commerce had terminated when "crude oil and asphaltic cement [bitumen] were combined to make bituminous concrete," the court concluded, in any event, that the "mere change in the form of the commodity" was insufficient to terminate the flow of interstate commerce (*id.* at 6a-8a). Moreover, the court concluded that the conspiracy had substantially and adversely affected interstate commerce by increasing the cost of the highway projects (*id.* at 7a-8a).

After rejecting petitioners' interstate-commerce arguments, the court found that certain co-conspirator declarations had been properly admitted into evidence and that the evidence was sufficient to sustain

the jury's verdict (Pet. App. 9a-11a). Finally, the court sustained petitioners' convictions on the mail-fraud counts (*id.* at 11a-12a). Petitioners do not challenge their convictions on the mail-fraud counts in this Court.

ARGUMENT

1. Contrary to petitioners' contention (Pet. 8-11), the court of appeals did not impermissibly relax the flow-of-commerce method of proving interstate commerce by adopting a "nexus to commerce" approach and by "discarding" the concept that the flow of commerce can terminate. Rather, viewing the facts of this case, the court below concluded that on the evidence and instructions in this case the jury properly concluded that the flow of commerce was not terminated by the mixing of bitumen with sand and gravel. This decision was correct.

A product that moves in interstate commerce pursuant to special order continues in the flow of commerce until its final destination. See, *e.g.*, *Walling* v. *Jacksonville Paper Co.*, 317 U.S. 564, 569 (1943); *United States* v. *South Florida Asphalt Co.*, 329 F.2d 860 (5th Cir.), cert. denied, 379 U.S. 880 (1964); *Plymouth Dealers' Ass'n of Northern California* v. *United States*, 279 F.2d 128 (9th Cir. 1960). The fact that the product is altered, or mixed with or imbedded in other materials, does not necessarily halt the flow of interstate commerce.[3] Indeed, on facts

[3] See, *e.g.*, *Rasmussen* v. *American Dairy Association*, 472 F.2d 517 (9th Cir. 1972), cert. denied, 412 U.S. 950 (1973) (ingredients from out of state combined with local water and

similar to this case, the Fifth Circuit concluded that mixing bitumen purchased out of state with sand and rock did not terminate the flow of interstate commerce. *Hardrives Co.* v. *East Coast Asphalt Corp.*, 329 F.2d 868, 870 (5th Cir.), cert. denied, 379 U.S. 903 (1964); *United States* v. *South Florida Asphalt Co., supra*, 329 F.2d at 865-866.[4]

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processed to produce filled milk product); *Mississippi River Corp.* v. *Federal Trade Commission*, 454 F.2d 1083, 1093 (8th Cir. 1972) (portland cement mixed with water); *Foremost Dairies, Inc.* v. *Federal Trade Commission*, 348 F.2d 674 (5th Cir.), cert. denied, 382 U.S. 959 (1965) (raw milk from out of state mixed with other milk to standardize butter fat content, pasteurized, in some cases homogenized, and bottled); *Plymouth Dealers' Ass'n of Northern California* v. *United States, supra* (assembly of automobiles within the state using parts and equipment shipped across state lines); *United States* v. *Richter Concrete Corp.*, 328 F.Supp. 1061 (S.D. Ohio 1971) (cement mixed with other ingredients to make ready-mix concrete).

Contrary to petitioners' argument (Pet. 10), the decision below does not conflict with *United States* v. *Flom*, 558 F.2d 1179 (5th Cir. 1977). *Flom* recognized that alterations do not necessarily halt the flow of interstate commerce but held that mere receipt of steel from out-of-state does not alone mean that the shipment is in the flow of commerce.

[4] Unlike *Gulf Oil Corp.* v. *Copp Paving Co.*, 419 U.S. 186 (1974), relied on by petitioners (Pet. 9-10), the court of appeals did not rely on the theory that a flow of commerce can be established in highway construction cases merely because highways are instrumentalities of interstate commerce. Rather, the court expressly noted that materials used in the construction projects had been purchased from out-of-state sources (Pet. App. 6a-8a). It further concluded that the evidence supported a finding that the conspiracy had a substantial effect on interstate commerce (*id.* at 8a-9a).

In this case, petitioners stipulated that both bitumen from an out-of-state source and bitumen containing oil from an out-of-state source were purchased for use in and were in fact used in the construction of the project allocated to petitioners (Tr. 484). They then presented evidence and argued to the jury that the flow of commerce had terminated. The district court properly let the jury decide whether the mixing of the bitumen with sand and gravel was sufficient to terminate the flow of interstate commerce (Pet. App. 14a). The district court's jury instruction on this issue, when viewed as a whole and within the context of the entire trial, "was not misleading and contained an adequate statement of the law to guide the jury's determination." *United States* v. *Park*, 421 U.S. 658, 675 (1975); see also *Kentucky* v. *Whorton*, 441 U.S. 786 (1979).[5] There is no need for this Court to review this essentially factual issue that the jury resolved adversely to petitioners.

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[5] Petitioners' proposed additional jury instructions on the interstate commerce issue (Pet. App. 16a-17a) were both unnecessary and erroneous. They were unnecessary because the instructions given by the district court, when viewed in the context of the entire trial, were adequate. *United States* v. *Park, supra.* They were erroneous because they contained inaccurate statements of law or did not reflect the evidence that had been introduced in the case. For example, petitioners' proposed instruction No. 51 referred to warehousing. There was no evidence of warehousing in this case. Indeed, petitioners stipulated that bitumen purchased out-of-state was intended for use in and was in fact used in the project allocated to them. Thus, even if the bitumen had been "ware-

2. Petitioners contend that the district court's instructions and the court of appeals' opinion allowed the jury to apply the *per se* rule to presume an effect on interstate commerce (Pet. 11-13).[6] This contention is erroneous.

The district court instructed the jury that interstate commerce is an essential element of a Sherman Act offense (Pet. App. 14a). In addition to the flow theory, it charged that this element may be satisfied where intrastate transactions "substantially affect interstate commerce" (*ibid.*), and that if the restraint were a local one, such an effect on interstate commerce had to be "direct and substantial and not merely [an] inconsequential remote or fortuitous" effect (Pet. App. 15a). Only after the district court instructed the jury that it first had to determine whether petitioners' activities were in the flow of or affected commerce did the court also instruct the

housed," it still would have been in the flow of commerce. See *Walling* v. *Jacksonville Paper Co., supra*, 317 U.S. at 569.

[6] Petitioners' argument has undergone a change between their appeal and this petition. On appeal, petitioners argued that the *per se* rule is inapplicable to affecting-commerce cases (Pet. App. 4a-5a). The court of appeals rejected this argument noting that it is without authority and clearly untenable (*ibid.*). The argument confuses the question of jurisdictional scope of the Sherman Act with the question of whether the conduct is a substantive violation of the Act (*ibid.*). Accordingly, the district court properly rejected petitioners' proposed instruction No. 47 which incorrectly states that the *per se* rule applies only where the interstate commerce element is satisfied under the flow of commerce theory (Pet. App. 16a).

jury that "[c]ertain types of conduct," including bid rigging, are regarded as *per se* illegal (Pet. App. 15a). Thus, under the district court's instruction taken as a whole, the jury could return a verdict of guilty if it concluded (i) that petitioners' activities were in or affected interstate commerce and (ii) that petitioners had in fact conspired to rig bids. This instruction is clearly correct. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

In affirming the district court, the court of appeals did not hold that the *per se* rule presumptively establishes the requisite impact on interstate commerce. To the contrary, the court correctly distinguished between the jurisdictional element of interstate commerce and the substantive question whether an unreasonable restraint exists (Pet. App. 4a-5a). The court of appeals found a substantial effect on interstate commerce in this case because the bid-rigging agreement directly affected the cost of the highway projects and thus affected the prices of commodities purchased out of state and used in those and other highway projects. This analysis is identical to that employed by this Court.[7]

[7] The jurisdictional question was resolved "as a matter of practical economics" which showed that a not insubstantial effect on interstate commerce was involved. *McLain* v. *Real Estate Board of New Orleans, Inc.*, No. 78-1501 (Jan. 8, 1980), slip op. 12; *Hospital Building Co.* v. *Trustees of Rex Hospital*, 425 U.S. 738, 745 (1976); *Burke* v. *Ford*, 389 U.S. 320, 321-322 (1967); *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 229 (1948).

3. Petitioners also challenge the admissibility into evidence of certain co-conspirator declarations. They first contend (Pet. 15) that the court below essentially held that this Court's holding in *Glasser* v. *United States*, 315 U.S. 60, 74-75 (1942), that the existence of a conspiracy must be proven by independent evidence and not solely by the declarations of alleged co-conspirators, was overruled by the adoption of Fed. R. Evid. 104(a).[8] The court of appeals, however, held that the co-conspirator declarations were admissible under its prior decision in *United States* v. *Santiago*, 582 F.2d 1128, 1134 (7th Cir. 1978) (Pet. App. 9a-10a). In *Santiago*, the court held that prior to admitting co-conspirator declarations into evidence the government must show by a preponderance of independent evidence that a conspiracy existed, that the defendant and declarant were members of the conspiracy, and that the statements were made in the course of the conspiracy.[9] *Santiago* does not permit "bootstrapping"—the consideration of the co-conspirator statements themselves in deciding the question of admissibility.[10] Thus, the question whether bootstrapping is permissible is not presented by this case.[11]

[8] Rule 104(a) provides that preliminary questions concerning the admissibility of evidence should be determined by the court and that in making the determination the court is not bound by the rules of evidence except those with respect to privileges.

[9] This procedure has been accepted by the First, Second, Third, Fourth and Eighth Circuits. *United States* v. *Bell*, 573 F.2d 1040, 1044 (8th Cir. 1978); *United States* v. *Stanchich*, 550 F.2d 1294, 1299-1300 (2d Cir. 1977); *United States* v. *Petrozziello*, 548 F.2d 20, 23 (1st Cir. 1977); *United States* v. *Trowery*, 542 F.2d 623, 626-627 (3d Cir. 1976), cert. denied, 429 U.S. 1104 (1977); *United States* v. *Stroupe*, 538 F.2d 1063 (4th Cir. 1976).

Petitioners further contend (Pet. 15) that the district court should have evaluated "both credibility and weight of the evidence" and made express findings on the record in concluding that the conspiracy existed and that they had participated in it. As we have noted, however, both the district court and the court of appeals concluded that the government had produced sufficient independent evidence proving the

[10] The Sixth Circuit allows bootstrapping. *United States* v. *Vinson*, 606 F.2d 149, 153 (6th Cir. 1979), cert. denied, No. 79-830 (Feb. 19, 1980). *United States* v. *Enright*, 579 F.2d 980, 985 n.4 (6th Cir. 1978), cited by petitioners, raised the question rhetorically but did not decide it. *United States* v. *Martorano*, 557 F.2d 1, 12 (1st Cir. 1977), cert. denied, 435 U.S. 922 (1978), allows bootstrapping but admonishes that the co-conspirator statements themselves should be given little weight. See also *United States* v. *Richman*, 600 F.2d 286, 297 (6th Cir. 1979).

[11] There was ample independent evidence to support admission of the co-conspirator statements. The testimony of Lawrence Loitz concerning his meetings with John Azzarelli set forth the details of the conspiracy and established Azzarelli's participation (Tr. 228-254). This testimony was corroborated by that of the other government witnesses who themselves were the out-of-court declarants (*e.g.*, Tr. 655-659, 757, 1033-1035, 1054-1056) and circumstantial evidence in the form of the various companies' activities including Azzarelli's, in preparing for the bidding (*e.g.*, Tr. 648-655, 1049-1054, 1587-1588, compare Gov't Exhs. 84, at 4 and 85A with Gov't Exh. 20 showing last minute increases on the bid amounts by Azzarelli; Pet. App. 10a n.14) and the actual bids themselves (Gov't Exh. 2, at 24-26).

existence of the conspiracy and petitioners' participation in that conspiracy (see Pet. App. 9a-11a). Thus, petitioners, who do not challenge either the sufficiency of the evidence or the credibility of any witness in this Court, could not have been prejudiced by the failure of the district court to make the findings requested by petitioners. Indeed, neither the Federal Rules of Evidence nor any prior decision of this Court requires a district judge to make such findings on the record prior to permitting the jury to consider co-conspirator testimony.[12] Therefore, there is no need for this Court to consider this issue in this case.

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[12] The general rule is that the district judge is not required to make any express findings on the record so long as the record reflects his belief that the government has satisfied its burden of proof on the co-conspirator issue. See, *e.g.*, *United States* v. *Continental Group, Inc.*, 603 F.2d 444, 457-460 (3d Cir. 1979), cert. denied, No. 79-679 (Jan. 14, 1980); *United States* v. *Green*, 523 F.2d 229, 233 n.4 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976).

In this case the record reflects that the district court believed there was sufficient independent evidence to allow the co-conspirator statements to go to the jury. Contrary to petitioners' assertion (Pet. 14), the district court made an express determination that the *Santiago* standard for admission of co-conspirator declarations was satisfied in this case (Pet. App. 18a-19a). Review of this factual determination is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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